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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

[redacted]

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent,

vs.

FALSTAFF BREWING CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1220

LOCAL NO. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondent,

vs.

FALSTAFF BREWING CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW AND JURISDICTION

Respondent concurs in petitioner's statement of the opinions below and does not question the jurisdiction of this Court.

QUESTIONS PRESENTED

The petitioner's statement of Questions Presented for Review is misleading and inaccurate because, as will be discussed *infra*, it is based upon facts and conclusions which are erroneous and not supported by the arbitrator's award or the opinions below. The actual facts and conclusions below do not give rise to the questions presented.

STATUTES INVOLVED

The singular statute directly involved is Section 301 of the Labor Management Relations Act, 29 U.S.C.A. Section 185, which petitioner does not refer to in its statement of Statutes Involved. Petitioner set forth no contentions in the Court below that the statutes it refers to were directly involved in this matter, nor any dispute over the meaning of said statutes.

COUNTER-STATEMENT OF THE FACTS AND THE CASE

This matter involves reciprocal actions under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. Section 185, one by Local Union No. 153, a/w International Brotherhood of Teamsters (hereinafter "Local 153" or "the Local") for confirmation and enforcement of an arbitration award rendered by a designated arbitrator of the New Jersey State Board of Mediation, which the parties had previously agreed would be binding and conclusive upon them, and the other by petitioner Falstaff Brewing Corporation (hereinafter "Falstaff" or "the Company") for vacation of the same award. The actions were

consolidated in the District Court. The District Court, under Rule 56, upon motion of Local 153, granted summary judgment confirming and enforcing the award and dismissing the action for the vacation of the award. (Petition, Appendix D.) The material facts were not, nor could they be, in dispute in the District Court. Submitted to that Court was the entire pertinent record of the arbitration case, including the collective bargaining agreement, the arbitration submission agreement, the transcripts of the pertinent arbitration hearings along with the relevant exhibits thereto, the voluminous briefs that both parties had submitted to the arbitrator during the course of the arbitration case, the arbitrator's two interim and his final award, decisions rendered by the National Labor Relations Board involving the parties relating to the ongoing arbitration case, and other exhibits pertinent to all of the foregoing.

Although arbitration is supposed to be an inexpensive and expeditious vehicle for the resolution of grievances, the instant arbitration case, commenced in October of 1975, took some 32 months to be completed, including the bifurcation of issues, testimony by some 120 witnesses, and extensive discovery. The arbitrator's final award was rendered on June 23, 1978. (Petition, Appendix E.) The order and final judgment of the District Court was filed on November 3, 1978. (Petition, Appendix F), and the Court of Appeals entered a judgment order on October 22, 1979 affirming "essentially for the reasons set forth in the opinion of the district court filed November 3, 1978." (Petition, Appendix C.) The petition for rehearing in banc was denied on November 19, 1979. (Petition, Appendix B.)

In its petition herein for the Writ of Certiorari to the Third Circuit, Falstaff omits and distorts salient facts and

mischaracterizes and emasculates the arbitrator's awards and the opinion rendered by the District Court, as well as the "view" of the Third Circuit. A counter-statement of the facts is necessary, and will be heavily condensed to the points raised in the petition. The petition was prepared in disregard of the applicable principle of review that the evidence is to be viewed and construed favorably to the prevailing party below.

Until April, 1972 P. Ballantine & Sons, a well-known regional brewer trading under the "Ballantine" label, operated a brewery and distribution depot at its Newark, New Jersey premises. For its distribution operation, it employed drivers, helpers and warehousemen at the depot to service its 15,000 to 17,000 customers in the New Jersey-New York City metropolitan area. These employees were represented for the purposes of collective bargaining by Local 153 and a sister local. In April, 1972 the Ballantine brewery and the depot were closed and its label, its delivery trucks, its customer lists and records, and other related assets were purchased by Falstaff. Falstaff took over the employment of more than 140 of the distribution employees, and commenced to manufacture the Ballantine-labeled beer and ale products in its own breweries. For a short time, it continued to utilize the former Ballantine distribution depot for the warehousing and distribution of the products to the former Ballantine customers and then moved the entire distribution operation and the employees and trucks to a new distribution depot it acquired in North Bergen, New Jersey.

Following a series of extensions of Ballantine's former collective bargaining agreements, which Falstaff had assumed, Falstaff and Local 153, which had been awarded jurisdiction over the entire new depot, commenced negotiations for a new collective bargaining agreement to be effective June 1, 1973. The employees, by and large, had been long-service distribution employees with Ballantine with relatively advanced age.[1] In order to provide these employees with reasonable job security with their new employer, Local 153 sought and obtained in the give and take of the negotiations specific agreements from the Company to continue the distribution operation with these bargaining unit employees and precluding the Company from discontinuing its use of its employees and trucks in favor of warehousing and distributing to the customers through independent distributors, their employees and trucks. Falstaff agreed that the bargaining unit work of the employees —the very work that these employees had performed for decades for Ballantine and then Falstaff, the warehousing and distribution of the products to the 15,000 to 17,000 customers in the New Jersey-New York City metropolitan area then and theretofore being serviced from the depot —would continue to be serviced by the bargaining unit employees and would not be given away to independent distributors. These agreements were incorporated into Article XVI of the new collective bargaining agreement at page 30 (Petition, A11-A12), and the meaning and effect of the provisions were central to the arbitration case which ensued. The arbitrator found, after hearing all of the pertinent testimony and examining all of the pertinent exhibits, that the parties had agreed that, and the provisions meant that, the Company was precluded from converting to distribution to the same customers through independent distributors.

1. Sadly, but literally, various of the employees have died in the years that have elapsed since the commencement of the arbitration case in 1975 waiting for its conclusion.

During the same give and take of negotiations for the collective bargaining agreement, the Company sought and obtained a very peculiar termination provision, one which required that the collective bargaining agreement be automatically extended from May 31, 1967, for periods of one year, from year to year, unless a party seeking changes in the agreement not only served written notice of a desire to modify same within 60 days of its expiration date, but also served specific written modification proposals within 30 days of the expiration. The peculiar provision was incorporated into the new agreement as Article XXII. (Petition, A27.) The arbitrator found Article XXII to be clear in this regard.

The new collective bargaining agreement also contained a broad scope grievance provision terminating in arbitration through the New Jersey State Board of Mediation. Said provision made grievable and then arbitrable

> "any difference between the Depot and the employees covered by this Agreement or between the Depot and the Union as to: (a) any matter relating to wages, hours of work or working conditions covered by this Agreement, and (b) any matter involving the interpretation, application or claimed violation of this Agreement. Both the Depot and the Union and the employees must resort to the use of the established grievance procedure as hereinafter provided."

Following the execution of the new agreement and until early October, 1975 Falstaff continued to distribute through the depot with the bargaining unit employees and trucks. However, in early October, 1975 it began a gradual layoff of the bargaining unit employees, selling the trucks to independent distributors, and commenced using those

independent distributors to distribute to the same customers. Within a short period of time, the Local discovered the conversion to the independent distributors and immediately grieved. The Company decided to continue the conversion in the face of the proceedings. As was ultimately reflected in the arbitration case, all of the Company's representatives that had participated in and had been familiar with the contract negotiations had been terminated in the years subsequent to the execution of the agreement by new managerial officials of the Company; the new managerial officials had decided to convert to distribution through independent distributors, as was noted by the arbitrator, without any significant reference to the terms of the collective bargaining agreement with Local 153.[2]

Upon the filing of the grievance, both parties, through counsel, agreed to waive all of the preliminary steps of the grievance procedure in order to expedite arbitration of the dispute. An arbitrator was designated by the New Jersey State Board of Mediation on November 5, 1975 and the first arbitration hearing took place on February 27, 1976. At the outset of the hearing the parties jointly agreed upon and entered into an arbitration submission agreement stating:

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2. The distribution by the independent distributors, one in New Jersey and the other in New York, was accomplished using the Ballantine-logoed trucks received by them from Falstaff. The Company had worked out credit and price arrangements with the distributors, turned over to them the sales records constituting the customer list of the depot along with its advertising materials, and various of the depot's salesmen and its manager transferred to the distributors. Subsequently, after the bulk of the bargaining unit employees had been laid off, the Company instituted mass-media advertising in the New Jersey-New York metropolitan area of the customers to promote the sale of the Ballantine-labeled products through the independent distributors.

"We, the undersigned, hereby agree to submit the following controversy to arbitration: (No. persons involved 140)

"Has the Company violated the applicable provisions of the collective bargaining agreement set forth on page 30 of the collective bargaining agreement? If so, what shall be the remedy?

* * * *

"We further agree that we will faithfully abide by and perform any award made pursuant to this agreement and that such award shall be binding and conclusive upon us."

The issue agreed upon for the arbitrator's resolution was not narrowly drawn or limited to "subcontracting", the word utilized by the Company throughout its petition herein, but was the broader, all-encompassing issue of whether the Company violated the provisions on page 30 of the labor agreement, and the appropriate remedy. The arbitrator found that the Company's conversion to independent distributors violated the said provisions.

During the course of the initial hearing on liability, the Company's principal witness conceded that there were only two modes of distributing the Ballantine-labeled products to the customers theretofore being serviced from the depot: (1) by continuing to distribute through its own depot with its own unit employees and trucks (as it had been doing and as Ballantine had done for decades before), or (2) by distributing through independent distributors, using their employees, trucks and facilities (*i.e.*, selling the product to the distributors to sell to those customers). The Company also presented testimony that the depot was not to be considered as closing down despite the

ongoing and heavy layoff of bargaining unit employees and utilization of independent distributors in their place; that the depot's operations might later be expanded again. The testimony of the Company was frought with issues of credibility for the arbitrator to resolve. The Company basically argued that the provisions on page 30 did not preclude it from distributing through independent distributors because it made no formal, exclusive agreement with the distributors and had not "intended" to convert to that mode of distribution. The Local argued that the Company did so convert and that such was precluded by the provisions for the 15,000 to 17,000 customers theretofore serviced from the depot by the unit employees and trucks. The arbitrator ultimately agreed with the Local in an interim award on the liability phase of the case rendered on April 21, 1976.

Then began the remedy phase of the case. Among the many disputes over damages which arose in this phase of the case was one involving the length of time for which damages should run to the employees. A determination by the arbitrator appeared to be necessary in order for the parties to calculate damages and offsets for the individual employees. With the depot's operation down to a relative minimum, the Local had served a sixty-day notice seeking to change the agreement effective June 1, 1976, its stated expiration date. The Company sent no sixty-day notice of any desire to either terminate or modify the agreement. The Local decided to forego its notice and did not send any thirty-day written modification proposals to the Company, advising the Company that it was allowing the agreement to automatically extend for an additional year without modification as provided for in Article XXII. The dispute over the meaning of Article XXII surfaced at an August 23, 1976 hearing before the arbi-

trator, the Company claiming that back pay should not be awarded beyond May 31, 1976 and the Local contending that the agreement had automatically extended to May 31, 1977. In order to resolve the dispute, the parties joined in an express stipulation to the arbitrator that the merits of the dispute be resolved by him. The stipulation, presented by the Company's counsel Mr. Kahn, at the hearing, was as follows:

> "Mr. Kahn: I think Ed /Cohen, the attorney for the Union/ and I both have certain stipulations which we can present to you on matters which we need some guidance on in terms of a preliminary award on the damages so that we can, therefore, proceed and calculate what would be due. I think the first question is whether the Collective Bargaining Agreement terminated on May 31, 1976 or whether it still continues in full force and effect." (Petition, A28.)

The parties then continued with the stipulations on other types of issues involving damages and offsets being presented to the arbitrator for a preliminary decision, outlining their respective position on and arbitrating the merits of each. In its posthearing brief, to the arbitrator, the Company specifically noted to the arbitrator that his determination of the contract extension issue was "vital" under "any theory of recovery." Neither party made any claim that the merits of this or any other issue presented were not arbitrable or were beyond the jurisdiction of the arbitrator and, perforce, neither party asked the arbitrator to decide if he had jurisdiction to resolve any of the issues. Such would have been untenable in light of the joint stipulation that the arbitrator resolve the merits of the contract extension issue and the other stipulated issues in

the context of determining the period for which damages were to run to the employees. The arguments of both parties on the contract extension issue, like the other issues, were strictly confined to the merits of same. The Company argued that, under Article XXII, service of a sixty-day notice by either party was all that was necessary in order to prevent the agreement from automatically extending for an additional year, and that service of thirty-day written modification proposals by the party seeking modification was not necessary. The Local argued that under Article XXII service of the thirty-day proposals was required, and that the contract automatically, by its own terms, extended for the additional year in the absence of such proposals. Both parties also advanced other arguments on the merits of the issue, agreeing that the language of Article XXII was unusual and that the arbitrator would have to interpret same and resolve the matter. The arbitrator found that the language plainly required the service of the thirty-day written modification proposals and that the Local had a right to forego the sending of same in order to allow the contract to extend itself to May 31, 1977. (Petition, A39-A41.)

Rather than select either a longer or a shorter period as reasonable for the running of back pay in the circumstances of the case, the arbitrator, apparently due to the positions of the parties, determined that the back pay should terminate upon the termination of the automatic one year extension of the agreement, May 31, 1977.[3]

Guided by the arbitrator's interim award on liability, the parties proceeded with discovery on individual dam-

3. The Company sent written notice of its desire to terminate the agreement effective May 31, 1977 during the course of the arbitration case, and the agreement was deemed to have expired on that date.

ages and the calculations regarding same, and this led to extensive hearings before the arbitrator on the actual damages and offsets for each employee. The arbitrator's final award, which makes final disposition of the contract interpretation issues, and damage and offset issues, as noted above, was rendered on June 23, 1978. (Petition, Appendix E.)

The facts set forth above are reflected in the exhibits submitted to the District Court, including the arbitrator's awards, and in the findings and conclusions set forth in the District Court's opinion. The petitioner's characterizations of the "views" of the District Court and the Court of Appeals in connection with the scope of review given an arbitration award—and given to this arbitrator's final award—are grossly inaccurate. The District Court's opinion, and the affirmance "essentially for the reasons set forth in" that opinion, speak for themselves, and do not say what the petitioner asserts. This will be more fully discussed *infra*.

ARGUMENT

As its four reasons for seeking the grant of the writ, petitioner argues (I) that the "views of" the Courts below on the proper scope of judicial review over the merits of the arbitrator's award were "wrong", and (II) that the merits of the contract extension issue should have been given *de novo* review for same were purportedly "jurisdictional". Petitioner then argues (III) that the arbitrator's finding that the agreement had been extended under Article XXII to May 31, 1977, and (IV) that the arbitrator's finding that Falstaff had violated the provisions on page 30 of the collective bargaining agreement, were wrong—characterized by petitioner as "arbitrary and capricious". Although petitioner does not assert that the arbitrator's finding that it had violated the provisions on page 30 were "jurisdictional", it reargues the merits of the issue *de novo* (as it also does in connection with the contract extension issue).

As a preface to its stated reasons for seeking the grant of the writ, petitioner states:

> "We submit that the courts below recognized that the Arbitrator's two crucial determinations were clearly erroneous, but believed that this Court's decisions made such determinations immune from judicial review on the merits." (Petition, p. 7.)

The statement is simply not true and petitioner, given the utmost proper license, cannot honestly so contend. Indeed, on the issue of liability—whether the Company had violated the provisions on page 30 of the collective bargaining agreement in converting to independent distributors—the District Court found that

"The facts here indicate that Falstaff had contractually agreed that the unit employees would continue, for the duration of the CBA, to distribute the beer to Falstaff's 15,000-17,000 retail customers of the Depot, and that Falstaff would use its own trucks for that purpose, as distinguished from having independent distributors do so, using their employees and trucks. This is what Falstaff promised the employees in agreeing to the work preservation provisions on page 30 of the CBA. The arbitrator found in his awards that this promise was breached when Falstaff began distributing its products to those same retail customers of the Depot through independent distributors. Falstaff had agreed with the Union and the employees that, if it was going to distribute Ballantine beer at all to those retail customers, its own employees would do so and they need not fear losing their jobs by a company conversion to independent distributors." (Petition, A31.)

On the issue of contract extension, the Court observed that

> "In light of the arbitrator's analysis of the facts presented to him, this Court concludes that it is logically possible to interpret Article XXII the way the arbitrator did. My subjective opinion as to the proper construction or application of the clause is of no moment here. *General Teamsters, Chauffeurs and Helpers, Local Union No. 249 v. Potter-McCune Company,* 412 F. Supp. 8, 11 (W.D. Pa. 1976). Certainly the arbitrator had grounds upon which to base his interpretation. *Cf. H.K. Porter Co., Inc. v. United Saw, File and Steel Products Workers of America,* 333 F.2d 596, 602 (3rd Cir. 1964). Whether such an interpretation is the best interpretation is not a matter for this court. *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, at 599." (Petition, A29.)

Obviously, on neither of the two arbitrated issues did the Court find that the arbitrator's award was "clearly erroneous". The opinion reflects the contrary.

Nor did the District Court deem that this Court's decisions made arbitrator's awards "immune from judicial review on the merits." From the very face of the opinion, it is clear that the District Court carefully reviewed the merits of the award under the standard required by *Enterprise Wheel and Car Corp., supra,* and *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123, 1126 (3rd Cir. 1969) —namely, to determine if the award "drew its essense from the collective bargaining agreement" as distinguished from the arbitrator "dispens/ing/ his own brand of industrial justice." The District Court discusses and states that it was reviewing the award in that context and it is crystal clear from the opinion that the Court did carefully review the award in that context. (Petition, A15-A21, A29-A30.) This Court has reaffirmed the narrow scope of judicial review on the merits of awards on arbitrable issues in repeated cases since *Enterprise Wheel and Car Corp.,* directly or by clear implication. See *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 377-380, 94 S. Ct. 629, 38 L.Ed.2d 583 (1974); *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 562-563, 96 S. Ct. 1048, 47 L.Ed.2d 231 (1976); *Buffalo Forge Co. v. Steelworkers,* 428 U.S. 397, 405, 96 S. Ct. 3141, 49 L.Ed.2d 1022 (1976); *Nolde Bros. v. Bakery Workers,* 430 U.S. 243, 252-255, 97 S. Ct. 1067, 51 L.Ed.2d 300 (1977), *reh. den.* 430 U.S. 988, 97 S. Ct. 1689 (1977).

Petitioner professes to be in full agreement with the narrow scope of review required, the "essence" test (Petition, p. 9); *it does not quarrel with the statements of law set forth in the District Court opinion. It merely—and irrationally in the face of the opinion—claims that the test was not applied to the award in this case.* Because the District Court expressly refused to agree with petitioner and found that the award drew its essence from the agreement, and the Court of Appeals affirmed, petitioner brazenly charges that both Courts found that the award was "judicially non-reviewable" and exercised "no function" of judicial review of the merits. (Reason I, Petition, pp. 6, 8.) The opinion of the District Court reflects careful review of the merits under the "essense" test. The District Court did not review the merits *de novo,* and that it was not supposed to do under the "essense" test.

As its second reason for seeking the grant of the writ, petitioner asserts that the issue of contract extension was "jurisdictional" and, in essense, subject to *de novo* judicial review. It states that "a finding by an arbitrator that he has jurisdiction to decide a dispute is subject to broad and rigorous judicial review" (Petition, p. 10), and that an arbitrator's "jurisdictional determination" has been held by this Court and various Courts of Appeal, including the Court of Appeals below, to be subject to full judicial review. With this statement of the law respondent has no quarrel and neither did the Courts below. However, the statement of the law and the cited cases are inapposite in the facts of this case. The arbitrator here made no "finding" that he had jurisdiction. He made no "jurisdictional determination". He did not have to. He was not asked to do so. As the opinion below found (Petition, A28-A29),

> "* * * The record demonstrates that the merits of the issue of contract termination or extension was, *by express stipulation* of both Falstaff and the Union, submitted to the arbitrator for decision without reservation or qualification. Additionally, the record indicates that Falstaff (along with the Union) strongly urged the arbitrator to decide the merits in his arbitration award of the issue because such a decision was vital to damage calculations that would have to be made.
>
> "* * * The issue of arbitrability was never posed at all. Even on the final day of hearing, April 18, 1978, when Falstaff moved to reargue to the arbitrator his prior rulings on several issues, including the CBA termination issue, there was no claim of lack of jurisdiction or want of arbitrability. Accordingly, Falstaff's argument to this court that the termination issue was not arbitrable must fail. Both parties clearly submitted the issue to the arbitrator." (Emphasis in original.)

Falstaff had stipulated to the arbitrator's "jurisdiction" and authority to hear and decide the merits of the issue by stipulating that the arbitrator was to decide the merits of the issue, raising no contention that the arbitrator lacked "jurisdiction" or authority. Assuming *arguendo* that the arbitrator did not otherwise have the "jurisdiction" or authority to determine the merits of the issue, the stipulation conferred same upon him. The District Court nevertheless reviewed the award on the issue to determine if it drew its essense from the collective bargaining agreement. (Petition, A29.)

Even putting aside the stipulation itself, however, the overriding arbitrable controversy over the length of time

that damages should run to the employees in the circumstances of the case—which here subsumed the dispute over the meaning and effect of Article XXII—was plainly not a "jurisdictional" one. As stated in *International Union v. ITT, Thermotech Division*, 508 F.2d 1309, 1314 (8th Cir. 1975), cited by petitioner, while the issue of contract extension is normally for the court, the exception is "where the parties have agreed to arbitrate issues of contract termination or expiration." The instant collective bargaining agreement made arbitrable "any difference between the" parties as to "any matter involving the interpretation, application or claimed violation of this Agreement", and stated that the parties "must resort to the use of the established grievance procedure", which terminated in arbitration, to resolve such differences. The dispute over the meaning of Article XXII here—the contract extension issue—was in and of itself arbitrable. *Enterprise Wheel and Car Corp., supra; United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 567-568, 80 S. Ct. 1343, 4 L.Ed.2d 1403 (1960). Moreover, the parties, in their arbitration submission agreement, which expressly empowered the arbitrator to determine the appropriate remedy for the contract violation, made the issue arbitrable. The parties had agreed to, and did, arbitrate all of the issues regarding damages, including the period that damages were to run to the employees. The contract extension issue was merely a part thereof. The issue was not "jurisdictional". It was simply one of the many arbitrable issues submitted for resolution to the arbitrator in the context of the ongoing arbitration hearings on damages. The cases cited by petitioner as being in conflict are not in conflict with this case. They are in-

apposite to this case. The Courts below never had to reach petitioner's "jurisdictional" argument because, as the opinion below concluded, the parties had stipulated the merits of the contract extension issue to the arbitrator for his resolution of same. As noted, the arbitrator's award on the issue was found to draw its essense from the collective bargaining agreement.

For its last two reasons for seeking the writ (III and IV), petitioner reargues *de novo* the merits of the arbitrator's determination that the Company violated the provisions on page 30 of the collective bargaining agreement in converting to independent distributors and that the collective bargaining agreement, pursuant to Article XXII, was automatically extended to May 31, 1977, the arbitrator selecting that date as reasonable for the termination of back pay liability to the employees. The opinion below reviews the merits of the arbitrator's determinations, finding them to be grounded in the language and agreement of the parties, and meeting the "essense" test. While professing to be in agreement with the "essense" test as appropriate for judicial review over the merits of an arbitrator's award on an arbitrable issue, petitioner ignores the test to reargue the merits *de novo*.

The discussion in the opinion below as to the merits of the arbitrator's determinations on both issues have been set forth *supra* and need not be repeated. There is one point in connection with the petitioner's reference to the contract extension issue which requires comment. The petitioner inaccurately asserts that "the decision of the courts below that the agreement was renewed for another year is in conflict with" the same Third Circuit's decision in a leading case followed by other Circuits, *Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers*, 191 F.2d 252 (3rd Cir. 1951),

cert. den. 342 U.S. 933, 72 S. Ct. 376, 96 L.Ed. 694 (1952), *reh. den.* 342 U.S. 956, 72 S. Ct. 625, 96 L.Ed 710 (1952). Of course, *the Courts below* did not decide that the agreement was extended pursuant to Article XXII. That decision was made by *the arbitrator* from the language of Article XXII and the facts of the case. The Courts below reviewed the award under the "essense" test. The Courts below did not find *Paterson Parchment* to be applicable, although cited by petitioner to the Courts below, because the parties had empowered the arbitrator to resolve the controversy over the meaning and effect of Article XXII. And the view of the Courts below in that regard is correct. In *Enterprise Wheel and Car Corp., supra,* 363 U.S. at 598-599, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960), this Court cautioned that arbitration awards on contract interpretation are not to be given plenary review to determine if the arbitrator was "applying correct principles of law to the interpretation of the collective bargaining agreement" to determine the merits of the dispute; that such "would make meaningless the provisions that the arbitrator's decision is final, for in reality it would never be final."

In so stating, however, we do not wish to leave the impression that we are in agreement that the arbitrator did not apply correct principles of law. While such an issue is not proper for a reviewing court, and the Courts below so concluded (Petition, A20-A21), the fact of the matter here is that the arbitrator was perfectly correct in his determination of the issue under the unusual language of Article XXII. The matter is discussed by the arbitrator at length in his award. (Petition, A39-A41.) With but one exception, every single case cited by petitioner in the Courts below or herein dealt with contract termination provisions that required only the giving of a 60-day notice, and did not make the contract continue

upon the failure of a party giving notice seeking to amend same to serve contract proposals on the other within a stated period of time, here 30 days. Section 8(d)(1) of the National Labor Relations Act, 29 U.S.C.A. Section 158(d)(1) requires only the giving of a 60-day notice of termination or modification prior to the stated expiration date, but does not require that the agreement continue on for a year, from year to year, as does the instant contract language. Section 8(d)(4) of that Act, 29 U.S.C.A. Section 158(d)(4), provides that the agreement should only continue on until the 60-day notice is served and the 60 days elapse. The year-to-year extension required by the instant agreement in Article XXII is solely a creature of the contract, not of Section 8(d). Moreover, Section 8(d) does not require that a party submit written contract proposals to the other to modify a contract, much less contain any time requirement for any such written proposals. Section 8(d)(2) of the Act, 29 U.S.C.A. Section 158(d)(2), only requires that the parties negotiate over modifications. The requirement of Article XXII that written modification proposals be submitted, and be submitted by 30 days prior to expiration (lest the agreement automatically continue in effect for another full year) is solely a creature of the contract, not of Section 8(d).[4] The Company had sought the unusual language for reasons of its own in the contract negotiations, but the effect of the language crosses sides of the negotiating table. Under the provisions of Section 8(d), a 60-day notice by a party seeking to renegotiate the agreement or terminate same effectively binds both parties to the termination of the

4. Although rearguing the merits *de novo* of the arbitrator's decision of the issue, petitioner does *not* assert that Section 8(d) of the National Labor Relations Act, is even one of the "Statutes Involved" in its petition. See Petition, p. 4.

agreement at its stated date of termination, in the absence of a successor agreement. The cases cited by petitioner so hold. But under the provisions of Article XXII of the agreement, it cannot do so, for that provision, as the arbitrator found, requires the party seeking to renegotiate the agreement, who serves a 60-day notice for same, to also serve the 30-day written proposals, and, in the absense of the proposals, requires that the contract automatically continue from year-to-year until properly terminated. It precludes one party from relying upon the 60-day notice served by the other party who seeks renegotiations. The Company was contending that the language of Article XXII "tracks" Section 8(d) and that the cases construing that Section should be followed by the arbitrator; it was ignoring the actual contract language, and the meaning of that language, which it had negotiated into Article XXII.

The singular exception is *East Bay Union of Machinists v. Fibreboard Paper Products Corp.*, 285 F. Supp. 282 (N. D. Calif., 1968), *aff'd* 435 F.2d 556 (9th Cir. 1970). However, while there was similar contract language regarding the submission of written proposals in that case, the union therein had timely served the 60-day notice seeking to modify the agreement, and had *also* "submitted its proposed modifications to Fibreboard on June 15, 1969, within the required time provided by" the agreement. (285 F. Supp., at 284.) The union nevertheless contended the agreement had not expired. The Court found that it had expired. It never had to reach, and did not discuss, the issue presented by the parties to the arbitrator in the instant case of the effect of such contract language in the absense or abandonment of timely modification proposals, the contract here requiring the automatic one year extension.

The arbitrator's decision on the merits is quite correct under the actual requirements of Article XXII. While the Courts below refrained from deciding the merits *de novo,* they found that the arbitrator "had grounds upon which to base his interpretation" of Article XXII, that his decision was logical, and that it was binding upon Falstaff; basically, that it drew its "essense" from the agreement.

Finally, Falstaff takes the same approach in rearguing the merits of the arbitrator's finding that it had wrongfully converted to independent distributors in violation of the provisions on page 30. It grossly misstates the arbitrator's finding as to the meaning of those provisions and the promises it had made, refers to the finding as if they were *de novo* findings of the Courts below, and argues that same "conflicts" with other Circuit court decisions. The decisions it cites, however, are wholly alien and inapplicable *even to the merits* of the arbitrator's decision.

CONCLUSION

Petitioner sets forth no special or important reasons for the granting of the writ. Petitioner merely mischaracterizes the findings and conclusions of the arbitrator and of the Courts below. The Court of Appeals decided no federal question in a manner conflicting with the decisions of this Court or of any other Court of Appeals. To the contrary, the arbitration award was completely reviewed under the scope of review determined as proper by this Court. The Petition should be denied.

Respectfully submitted,

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